United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

137

BRIEF FOR APPELLANT AND JOINT APPENDIX

4-26

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

894

No. 18,012

WILLIAM W. TURNER, *Appellant*,

v.

ROBERT F. KENNEDY, et al., *Appellees*.

Appeal From Judgment of the United States District Court for the District of Columbia

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

STATEMENT OF QUESTION PRESENTED

The question presented in this appeal is:

Whether statements made by a government employee in correspondence with members of Congress are subject to a statutory or constitutional privilege whereby said statements may not serve as the predicate for disciplinary action against the government employee, a veteran enjoying rights secured to him under the Veterans Preference Act.

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Appeal From Judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

A complaint for declaratory judgment and relief in the nature of a mandatory injunction was filed in the United States District Court for the District of Columbia. Jurisdiction of that court was invoked pursuant to 28 U.S.C. §§ 1331 and 2201.

On May 20, 1963, the District Court entered an order granting appellees' motion for summary judgment, denying that of appellant, and dismissing the action. A notice of appeal was filed on June 14, 1963. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

By letter dated June 15, 1961, appellant, a veteran, was notified by appellee John Edgar Hoover that his employment with the Federal Bureau of Investigation was to be terminated as of the close of business on the thirtieth day after receipt of the letter (JA 10).[1] As of that date appellant was a Special Agent of the Federal Bureau of Investigation with veterans preference rights under Section 14 of the Veterans Preference Act, 5 U.S.C. §§ 851-869 (JA 4).

Following appellant's reply to appellee Hoover's letter of charges, appellant was advised by letter dated July 3, 1961, that all charges preferred by the June 15 letter were sustained and that appellant's dismissal was to be effective as of July 19 (Ex. A-4; AR 23).

In the months immediately preceding appellant's removal from employment, he had endeavored, initially within the Federal Bureau of Investigation, to obtain redress for grievances. His efforts to accomplish this purpose proving fruitless within the agency, appellant then undertook to correspond with selected members of Congress in an effort to obtain his redress from that body (Ex. A-1, A-2; AR 8, 13). Statements of fact and opinion set forth in letters to the late Senator Estes Kefauver (Ex. A-1; AR 8) and Congressman Emanuel Celler (Ex. A-2; AR 13) were to become the sole predicate for appellant's removal from his employment.[2]

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[1] Citations to the record and appendix in this case have been abbreviated as follows:

Joint Appendix ..... JA
Pertinent Portions of Administrative Record ..... AR

[2] The statements in appellant's letters to Senator Kefauver and Congressman Celler which served as the predicate for his removal appear in appellee Hoover's letter of June 15, 1961, to appellant. That letter appears at page 10 of the Joint Appendix.

In the letter of June 15 (JA 10) four charges were preferred against appellant, namely:

1) that appellant demonstrated by untrue or unjustified statements that he did not possess the truthfulness, accuracy and responsibility required of a Special Agent (JA 10);

2) that appellant was not amenable to discipline (JA 14);

3) that appellant had shown a poor attitude toward the Federal Bureau of Investigation and its Director (JA 15);

4) that appellant made unauthorized disclosures of information to members of Congress, indicating appellant to be a security risk (JA 18).

Each specification supporting the first and fourth charges, and one specification supporting charge three, consisted of statements of fact or opinion made by appellant in correspondence he initiated with Senator Kefauver or Congressman Celler. The specifications supporting charge two, and all but one of the charge three specifications, consisted of narrative descriptions of appellant's previous conduct.

Following appellant's removal from employment with the Federal Bureau of Investigation he promptly appealed his dismissal to the Civil Service Commission for relief pursuant to Section 14 of the Veterans Preference Act, 5 U.S.C. § 863. Thereafter, and on or about August 17, 1962, the Commission's Board of Appeals and Review affirmed the decision of the Appeals Examining Office (Ex. A-8; AR 42) which had sustained the Federal Bureau of Investigation's removal action (Ex. A-5; AR 24). In the course of the proceedings before the Civil Service Commission, two of the four charges preferred against appellant were dismissed; *viz.*, that charge alleging appellant was not amenable to discipline (Ex. A-5; AR 38), and that charge

alleging appellant constituted a security risk (Ex. A-5; AR 31).

In concluding that there existed sufficient evidence to sustain charges one and three, the Commission relied on statements made by appellant in the described correspondence and evidence tending to disprove these statements. Specifically, the Commission found that statements made by appellant in his letter to Senator Kefauver (specifications 1C, 1D, 1E) and his letter to Congressman Celler (specification 1F) supported the charge that appellant had made untrue statements (Ex. A-5, AR 40; Ex. A-8, AR 43-44). The Commission further found that statements in appellant's letter to Senator Kefauver (specification 3C) supported the charge that appellant had demonstrated a poor attitude toward the Federal Bureau of Investigation and its Director (Ex. A-5; AR 40).

But for appellant's having corresponded with Senator Kefauver and Congressman Celler, there was no evidence to support either charge upon which appellant's removal was predicated.

On October 5, 1962, appellant filed a complaint (JA 2) in the United States District Court for the District of Columbia seeking a declaratory judgment determining his right to continued employment, and an order restoring him to his employment in the Federal Bureau of Investigation. On May 20, 1963, the District Court entered an order granting appellees' motion for summary judgment and dismissing the action. This appeal, notice of which was filed on June 14, 1963, is taken from that order.

STATUTES INVOLVED

Title 5, U.S.C., § 652(d):

> "The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF POINTS

1. Appellant's removal from employment with the Federal Bureau of Investigation, predicated upon statements made by him in correspondence with members of Congress, was in violation of his statutory rights under §§ 863 and 652(d) of Title 5, U.S.C. The cited statutes afford to appellant the unqualified right to petition members of Congress without interference or reprisal.

2. Appellant's removal from employment with the Federal Bureau of Investigation, predicated upon statements made by appellant in correspondence with members of Congress, was in violation of his rights under the First Amendment to the Constitution, in that said Amendment affords to appellant the absolute right to petition Congress for the redress of grievances.

SUMMARY OF ARGUMENT

I

Section 652(d) of Title 5 U.S.C., prohibits any infringement of the right of persons employed by the federal government, within the civil service system, to furnish information to either House of Congress or any member thereof. *Levine* v. *Farley*, 70 App.D.C. 381, 107 F.2d 186, *cert. denied*, 308 U.S. 622 (1940); *Steck* v. *Connally*, 199 F. Supp. 104 (D.D.C. 1961). To sustain appellant's removal from federal employment on grounds that he made improper statements to members of Congress, is to deny and interfere with appellant's right, secured by 5 U.S.C. § 652(d), to communicate with members of Congress. Excepting the statements by appellant to members of Congress no predicate for his removal has been demonstrated.

II

Should section 652(d) of Title 5 U.S.C. be construed to confer upon government employees, within the civil service system, only a qualified right to inform the Congress or its members, it constitutes a law enacted by Congress abridging the right of the people to petition the government for a redress of grievances, in violation of the First Amendment to the Constitution.

ARGUMENT

Appellees Were Prohibited From Discharging Appellant Solely By Reason of His Exercising a Right Protected By Statute and the First Amendment

In this appeal this Court is asked to review an administrative determination because of the failure of the appellees to comply with applicable procedures and statutes. There can be no question of the power of this Court to review under these circumstances. See *Hargett* v. *Summerfield*, 100 U.S.App.D.C. 85, 243 F.2d 29 (1957); *Manning* v. *Stevens*, 93 U.S.App.D.C. 225, 208 F.2d 827

(1953); and *Money* v. *Anderson,* 93 U.S.App.D.C. 130, 208 F.2d 34 (1953). Executive agency discretion, which under usual circumstances controls employee removal and discipline, is not so broad as to permit the agency to ignore employee rights expressly secured by statutory or constitutional provisions.

This Court, in *Levine* v. *Farley,* 70 App.D.C. 381, 107 F.2d 186, *cert. denied,* 308 U.S. 622 (1940), had occasion to review the dismissal of a postal clerk because of his activities in a postal union. Following the discharge of a fellow employee, the local, of which Levine was a member, adopted a resolution severely criticizing the Department. Levine was a member of a committee of the local formed to distribute and publicize the resolution and in this connection participated in the sending of the resolution to newspapers, as well as the Civil Service Commission, congressmen, congressional committees, and others. Levine was dismissed from his employment on the ground that he had aided and abetted in the preparation of and the newspaper publication of untruthful statements discrediting the Post Office Department. From the dismissal of a petition for a writ of mandamus by the District Court Levine appealed.

On appeal, Levine asserted that his dismissal was, among other things, in violation of 5 U.S.C. § 652, a statute which included the precise language now appearing in 5 U.S.C. § 652(d). In affirming the lower court decision, however, this Court promptly recognized that Levine was not dismissed for having made untruthful statements to members of Congress, but for having caused the publication of false statements in newspapers, an activity outside the ambit of § 652. This Court stated:

> "The statute, which we have printed in the margin, provides that no person in the classified civil service shall be removed therefrom except for such cause as will promote the efficiency of the service. It expressly

provides that neither membership in an organization of postal employees having for its object improvement in the condition of labor, *nor the presenting of grievances to Congress, shall be cause for removal.* Petitioner insists that the statute was violated because, as he claims, he acted as a member of the association of clerks in presenting to the proper authorities of government the wrongful action of the Postmaster at New York in the removal of a former clerk, a member of the association. But we think this is not so clearly shown as to justify judicial intervention.

> "*The matter contained in the resolution, if those who participated in its preparation believed it to be true, was undoubtedly a proper subject to bring to the attention of the postal authorities and of the Congress.* But the charge against petitioner and the ground stated for removal made no mention of the preparation of the resolution or of the fact that copies were sent to the postal authorities or the members of Congress. The offense was the publication of false statements in the newspapers, and on this charge petitioner was tried precisely according to the terms of the statute. . . ." 107 F. 2d at 190. (Emphasis supplied.)

More recently, in *Eustace* v. *Day*, ... U.S.App.D.C. ...., 314 F.2d 247 (1962), in affirming the dismissal of a postal employee, this Court concluded the employee's activity to be outside the scope of protection afforded by § 652(c) of Title 5 U.S.C., a section closely parallel to § 652(d). In *Eustace*, the activity complained of consisted of the dissemination of handbills to the *public* which brought the postal service into disrepute. This activity, closely analogous to that in *Levine* v. *Farley, supra*, is clearly without the scope of protection afforded by § 652(c).

A case in which the conduct complained of, and the conduct which served as the basis for removal from employment, consisted of petitioning the Congress appears in *Steck* v. *Connally*, 199 F. Supp. 104 (D.D.C. 1961). In this

case the discharged employee had circulated a petition to a member of Congress among his fellow employees. It appears from the opinion in *Steck* that the petition contained untrue statements. For having made the false statements, the employee was discharged.

The District Court, in granting the plaintiff-employee's motion for summary judgment, stated:

> "The Civil Service Act, 5 U.S.C.A. § 652, subsection (d), guarantees to all civil service employees individually and collectively, the right to petition Congress, or any member of Congress, or to furnish information to either House of Congress, or to any Committee or member thereof, free from any restriction or interference on the part of their superior officers.
>
> "Subsection (c) of the same Section, explicitly provides that the presentation of any grievance or grievances to Congress or any member thereof, shall not constitute or be a cause for reduction in rank or compensation or removal of such person or group of persons from the service. This statute does not contemplate that the head of a Department may censor the contents of the petition or that he may dismiss the employee concerned therein, if he can prove that the statements contained in the petition are untrue." 199 F. Supp. at 105.

In *Steck*, the court appropriately recognized an absolute protection to the contents of a petition to members of Congress. To suggest that the act of petitioning Congress falls within the scope of protection afforded by § 652(d), but that the contents of the petition do not, is to frustrate entirely the clear statutory language. By using statements made by appellant in correspondence with congressmen against him in disciplinary proceedings, appellees have not only interfered with his right to petition Congress, but they have effectively denied that right altogether. For § 652(d) to have any meaning, an absolute privilege must attach to communications to members of Congress. Were

the rule otherwise government employees would decline under any circumstances to make disclosures to Congress for fear of reprisals from their superiors.

The case of *Keyton* v. *Anderson*, 97 U.S.App.D.C. 178, 229 F. 2d 519 (1956), is not to the contrary. In *Keyton*, the employee was discharged because, among other things, she had made defamatory statements about her superiors in a grievance filed with them. No question arose in *Keyton* concerning the right to petition Congress or an employee's rights under §652(d). Moreover, in *Keyton* there were additional grounds for the discharge of the employee.

The charges serving as the basis for appellant's removal in this case arise wholly from his statements to Senator Kefauver and Congressman Celler. Appellees cannot properly urge that appellant was removed by reason of his demonstrating that he did not possess the truthfulness, accuracy and responsibility required of a Special Agent, for these are conclusions or inferences drawn exclusively from his letters to members of Congress. Had these letters been removed from consideration by appellees, as they should have been, there would have remained no evidentiary basis upon which appellant's removal could have been predicated. He would today remain an employee with the Federal Bureau of Investigation unless by other conduct, not afforded the absolute protection of § 652(d), he demonstrated himself unsuited to be a Special Agent.

Should 5 U.S.C. § 652(d) be construed as to create a qualified right to petition members of Congress, it constitutes a law enacted by the Congress abridging the right of the people to petition the government for a redress of grievances and is therefore unconstitutional. Just as the Congress may pass no law providing for the summary discharge of federal employees who invoke their privilege against self-incrimination, so, too, it may pass no law which abolishes or impinges the right of petitioning the

government. The first would be an unconstitutional denial of an individual's due process rights, *cf. Slochower* v. *Board of Higher Education of City of New York,* 350 U.S. 551 (1956), the latter a direct violation of the First Amendment. A statute which compels disclosure from persons petitioning the Congress, such as disclosure of the identity of a particular lobbying group, cannot be construed as an abridgement of First Amendment rights. *Cf. United States* v. *Harriss,* 347 U.S. 612 (1954). A statute which permits use of statements against a petitioner made in his petition cannot be so justified. The immediate and direct result of such an enactment would be the restraining of all petitions for fear of some form of prosecution for having so acted. Such a deterrent effect would be in direct contravention to the right secured inviolate by the First Amendment.

CONCLUSION

For the foregoing reasons, this appellant respectfully submits that the judgment of the court below should be reversed, and the case remanded with directions to the Court below to enter judgment for Appellant.

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APPENDIX

INDEX TO JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,012

WILLIAM W. TURNER, *Appellant*

v.

ROBERT F. KENNEDY, ET AL., *Appellees*

Appeal from an Order of the United States District Court for the District of Columbia

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JOINT APPENDIX

Docket Entries C. A. No. 3160-62

October 5, 1962—Complaint and Exhibit A filed and Summons issued.

January 7, 1963—Answer of Defendants.

January 28, 1963—Motion of Defendants for Summary Judgment and Exhibits A, A1 through A8.

March 11, 1963—Cross-Motion of Plaintiff for Summary Judgment.

May 20, 1963—Order Denying Motion of Plaintiffs for Summary Judgment and Granting Motion of Defendants for Summary Judgment and Dismissing Action, Matthews, J.

June 14, 1963—Notice of Appeal.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3160-62

WILLIAM W. TURNER
932 Esmeralda
San Francisco, California, *Plaintiff*

v.

ROBERT F. KENNEDY
Attorney General of the United States
United States Department of Justice
Washington 25, D. C.

JOHN EDGAR HOOVER
Director
Federal Bureau of Investigation
United States Department of Justice
Washington 25, D. C.

JOHN W. MACY
Chairman
United States Civil Service Commission
8th & F Streets, N. W.
Washington 25, D. C.

ROBERT E. HAMPTON
Commissioner
United States Civil Service Commission
8th & F Streets, N. W.
Washington 25, D. C.

FREDERICK J. LAWTON
Commissioner
United States Civil Service Commission
8th & F Streets, N. W.
Washington 25, D. C., *Defendants*

Complaint for Declaratory Judgment Determining the Rights of the Plaintiff to Restoration of His Position in the Employment of the United States and for Other Relief in the Nature of A Mandatory Order Restoring the Plaintiff to His Position of Employment

1. This action arises under the following statutes: 5 U.S.C. § 863; 5 U.S.C. § 652; 5 U.S.C. § 291; 5 U.S.C. § 300; 28 U.S.C. § 1331; and 28 U.S.C. § 2201.

2. Plaintiff is a citizen of the United States and a resident of the State of California.

3. The defendant Robert F. Kennedy is the duly appointed, acting, and qualified Attorney General of the United States and is the officer charged by law with the administration of laws and regulations of the Department of Justice relating to the employment of civilian employees under the jurisdiction of the Federal Bureau of Investigation and as such is one of the officials of the United States authorized to direct and order the plaintiff's restoration to duty upon the order of this Court.

4. The defendant John Edgar Hoover is the duly appointed, acting, and qualified Director of the Federal Bureau of Investigation, a bureau within the Department of Justice, and administers laws and regulations relating to the employment of employees under the jurisdiction of the Federal Bureau of Investigation and as such is one of the officials of the United States authorized to direct and order the plaintiff's restoration to duty upon the order of this Court.

5. The defendant John W. Macy is the duly appointed, acting, and qualified Chairman of the United States Civil Service Commission, charged by law with the administration of the so-called Civil Service Acts and the Veterans Preference Act, and various executive orders and regulations relating to the retention of civilian personnel in the government services of the United States, and said defendant is sued in that capacity only.

6. The defendants Robert E. Hampton and Frederick J. Lawton are the remaining members of the Civil Service Commission and as such participate in the administration of those laws described in paragraph 5 above. Each is sued in his capacity as a Civil Service Commissioner only.

7. On June 15, 1961 plaintiff was an employee of the Federal Bureau of Investigation with Veterans Preference rights under section 14 of the Veterans Preference Act, 5 U.S.C. § 863, and plaintiff was employed in the capacity of a Special Agent, stationed at Knoxville, Tennessee.

8. On or about June 15, 1961, plaintiff received a letter from the defendant Director of the Federal Bureau of Investigation, John Edgar Hoover, informing plaintiff that the Bureau contemplated dismissing him from his position as a Special Agent, effective at the close of business thirty days following the receipt of said letter of June 15. A copy of said letter of proposed removal is annexed hereto as Exhibit A. The charges were substan-

tially predicated upon statements made by plaintiff in correspondence with members of Congress.

9. Thereafter plaintiff answered the charges set forth in said letter of removal and by letter dated July 3, 1961 plaintiff was advised by defendant John Edgar Hoover that the Bureau was effecting plaintiff's removal from employment as a Special Agent, as of the close of business on July 19, 1961. By virtue of this action plaintiff has been forced to remain separated from his position and remains so separated at the present time.

10. Plaintiff, a veteran, thereupon promptly and timely appealed his dismissal to the Civil Service Commission for relief pursuant to section 14 of the Veterans Preference Act (5 U.S.C. § 863). On or about August 17, 1962 the said Commission sustained plaintiff's removal on two of the four charges serving as the basis for his dismissal. The Commission determined that the charge that plaintiff did not possess the truthfulness, accuracy and responsibility required of a Special Agent of the Federal Bureau of Investigation was warranted, as was that charge alleging that plaintiff demonstrated a poor attitude toward the Federal Bureau of Investigation and its Director. Allegations that the plaintiff was not amenable to discipline and that plaintiff was unable or unwilling to protect the security of confidential information, and that he constituted a security risk, were dismissed.

11. In rejecting plaintiff's contention that his communications with members of Congress could not serve as the predicate for his removal, the Civil Service Commission stated, in part, that the plaintiff:

> "as a person employed in the Civil Service of the United States, had a right to petition Congress as provided in 5 USC 652(d). However, the Board does not believe that the Congress intended, in enacting this statute, to create an absolute or unqualified right.

The right given by the statute may be lost, we believe, if (1) the employee's conduct constituted an abuse of the right and went beyond the scope of permissible activity contemplated by the Congress in enacting this legislation, and (2) thereby caused the agency immediate and substantial harm.

"Specifications 1C, 1D, 1E, and 1F in the advance notice, taken together, describe statements of the appellant which, if true, would lead to the conclusion that the Federal Bureau of Investigation was staffed with dishonest, irresponsible, and incompetent people, incapable of carrying out the public trust assigned to it. If the statements are untrue, the Congress is apt to be grossly deceived. Certainly, statements of this kind, if false, are likely to impair the efficiency of the agency. Moreover, the irresponsibility of the appellant in making such unjustified statements would render him incapable of performing useful and efficient service for the agency in the future.

"In summary, we are of the opinion that the writing of false and irresponsible statements which either demonstrate the employee's unsuitability for continued employment in the agency or cause substantial harm to his agency, deprives him of the statutory protection of 5 USC 652(d). Consequently, having found specifications 1C, 1D, 1E, and 1F substantiated, the Board concludes that Mr. Turner's removal was not in violation of that statute."

12. Plaintiff asserts that he was unlawfully and improperly removed from his position as Special Agent of the Federal Bureau of Investigation, as there was no proof of the charges preferred against him in that letter dated June 15, 1961 (Exhibit A).

13. Plaintiff asserts further that he was unlawfully and improperly removed from his position without sufficient

grounds and contrary to Title 5 U.S.C. § 863, by virture of a determination made by his superiors to remove plaintiff from government service solely because he exercised his lawful right of directing letters to selected congressmen and senators requesting an investigation of personnel practices within the Federal Bureau of Investigation, particularly insofar as such practices related to the plaintiff.

14. Plaintiff further asserts that the procedures whereby he was removed from his position, both those of the Department of Justice and those of the Civil Service Commission, were unlawful and improper in that such removal procedures and plaintiff's resulting discharge from the service of the government were violative of Title 5 U.S.C. § 652(d), which states:

> "The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."

15. Alternatively plaintiff asserts that § 652(d) of Title 5 U.S.C. as construed and applied by defendants to plaintiff's removal from government service constitutes a violation of his rights under the First Amendment to the Constitution which guarantees the right of freedom of speech and the right to petition the government for a redress of grievances.

16. Plaintiff further asserts that 5 U.S.C. § 863 as construed and applied by defendants to plaintiff's removal from government service for having petitioned members of Congress constitutes a violation of his rights under the First Amendment to the Constitution which guarantees the right of freedom of speech and the right to petition the government for a redress of grievances.

17. The defendants Robert F. Kennedy and John Edgar Hoover have failed to restore plaintiff to his position as a Special Agent in the Federal Bureau of Investigation and have on the basis of the aforementioned unjust decisions of the defendant John Edgar Hoover and the Civil Service Commission prevented and continue to prevent the plaintiff from performing his duties in the government service and from retaining his position and rights as such an employee, and have deprived plaintiff of his salary since the date of his discharge to the present time; and it is the plain and ministerial duty of the defendants Robert F. Kennedy and John Edgar Hoover to reinstate plaintiff to his former position with the Federal Bureau of Investigation as of the date on which plaintiff was wrongfully removed therefrom.

18. The action of the Civil Service Commission, and more particularly the defendants John W. Macy, Robert E. Hampton and Frederick J. Lawton, in upholding the plaintiff's removal from his employment was unlawful, improper, and arbitrary, and without reason, as they, acting as the Civil Service Commission well knew or should have known that the Federal Bureau of Investigation was following improper and unlawful policies and personnel practices and procedures when it discharged plaintiff for having petitioned selected members of the Congress, which petitions the defendant John Edgar Hoover unilaterally, summarily, and arbitrarily asserted were false and untrue and demonstrative of a poor attitude toward the Federal Bureau of Investigation and its Director, the defendant John Edgar Hoover. The action of the Civil Service Commission was erroneous and unlawful insofar as it specifically held that there was sufficient evidence to sustain charges 1 and 3 as set forth in the letter dated June 15, 1961 (Exhibit A); and in holding that by virtue of the statements made by plaintiff in his petitioning letters to the selected members of Congress he was not entitled to

the statutory protection of 5 U.S.C. § 652(d) or to the protection of the First Amendment to the Constitution.

19. Plaintiff has exercised the greatest diligence ~~is~~ IN prosecuting his claim for reinstatement and retention as an employee of the government service, including the prosecution of his claim before the Civil Service Commission and the institution of this action.

WHEREFORE, the plaintiff prays:

(1) That the plaintiff have judgment against the defendants fixing, declaring, and determining his rights as an employee of the United States, ordering that the plaintiff is entitled to be reinstated to the position from which he was illegally removed.

(2) That a mandatory injunction issue directed to the defendants Robert F. Kennedy and John Edgar Hoover to restore the plaintiff to his rightful position from which he was wrongfully and illegally removed as of the date of his removal, July 19, 1961.

(3) For such other and further relief as to the Court may seem just and proper.

WILLIAMS & STEIN

By /s/ EDWARD BENNETT WILLIAMS
Edward Bennett Williams

/s/ VINCENT J. FULLER
Vincent J. Fuller
1000 Hill Building
Washington 6, D. C.

Attorneys for Plaintiff

Exhibit A

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Washington 25, D. C.
June 15, 1961
PERSONAL

Mr. William W. Turner
Federal Bureau of Investigation
Knoxville, Tennessee

Dear Mr. Turner:

This is to inform you that the Bureau contemplates dismissing you from your position as a Special Agent in the Federal Bureau of Investigation, effective at the close of business thirty calendar days following your receipt of this letter and exclusive of the date of its receipt by you.

The reasons for this proposed action are as follows:

1. You have repeatedly demonstrated by untrue or unjustified statements you have made that you do not possess the truthfulness, accuracy, and responsibility required of a Special Agent of the FBI, who must factually report the results of official investigations and cannot make assertions which he knows to be untrue or report as factual information which he does not definitely know to be true.

The following statements which you have made are untrue and you either deliberately made them knowing them to be false, or you made them without first having ascertained whether or not they were true:

A. In a letter to Senator Estes Kefauver dated April 30, 1961, you alleged that because of your request for a transfer from the Oklahoma City Division of this Bureau, retailiation was taken against you. This statement is false and you had been previously advised of the reasons for all disciplinary action taken against you. On December

27, 1960, you were censured and placed on probation, at which time you were advised in writing that the action was based on your entirely unsatisfactory attitude, the dissatisfaction you had expressed concerning your office of assignment and the fact that you apparently were placing your personal preferences and conveniences above the welfare and needs of the FBI. Your unsatisfactory attitude, referred to in the letter to you dated December 27, 1960, was evidenced by the following: On the first day you worked in the Oklahoma City Division you let it be known that you did not like Oklahoma City. Your facial expressions, mannerism and talk led your Special Agent in Charge to believe that you were sulking and pouting because of your assignment. On November 28, 1960, your Special Agent in Charge talked to you about your attitude advising you that no FBI employee could satisfactorily perform his duties by sulking, pouting or acting like a spoiled child. You replied that you would do your work but you did not like working in Oklahoma. You further commented during the interview of November 28, 1960, that you wanted to be assigned to the large offices in the large cities where there was more night life and activity. On December 8, 1960, your Special Agent in Charge again talked to you as your attitude did not appear to be getting any better. The Special Agent in Charge doubted whether you should be utilized for certain interviews because of your apparent outward dislike for the area. At that time you informed the Special Agent in Charge that you still disliked Oklahoma, did not like to be in that rural area and that you would never tell the people of Oklahoma that you liked it there as you did not. In subsequent disciplinary action you were advised of the reasons therefor and none of the disciplinary action taken against you was based on your request for a transfer.

B. In the same letter you alleged that soon after reporting to Oklahoma City Division on October 10, 1960,

you were assigned to a permanent road trip covering four counties remote from Oklahoma City which action appeared to you to negate the express purpose for which you had been transferred to that division; namely, use of certain technical qualifications you possessed. The counties in which you were assigned investigative duties are not remote from Oklahoma City and previous experience with a predecessor in that same territory had demonstrated that he was able to perform his duties on that road trip assignment and also satisfactorily fulfill his responsibilities as a technically qualified Special Agent.

C. You claimed in the same letter that Inspector Roy K. Moore was obviously sent to Oklahoma City to discredit you rather than conduct an impartial investigation into certain complaints and objections you had made. This statement is false. You could not possibly have known the motive and reasons for instructing Inspector Moore to proceed to Oklahoma City to make the inquiry to which you referred. He had no mission to discredit you and your statement that he did was irresponsible and completely unjustified. His mission was to obtain the facts impartially concerning the complaints and objections that you had made.

D. In the same letter you alleged that a memorandum prepared by Special Agent in Charge Wesley G. Grapp of the Oklahoma City Division dated January 31, 1961, and relating to your work performance, is now missing from file. This statement is untrue, as the memorandum in question is in the Bureau's files and has never been missing.

E. In the same letter you stated that morale in the FBI was at an all-time low and that as a result it has been increasingly difficult to recruit qualified new agents because competent men refuse to work under these conditions. You alleged further that Special Agent qualifica-

tions had been lowered so that clerks are now filling the new agents' training classes and that many new agents quit after their first few days in a field office. These statements are inaccurate, contrary to fact and clearly reflect your irresponsibility. Regarding the above-mentioned charges, any difficulty experienced in obtaining new Special Agents in the FBI is due to the high standards and qualifications upon which this Bureau insists and not due to poor morale as you have alleged. The FBI receives numerous applications from persons desiring to become Special Agents but only a small percentage of these are appointed because most do not meet the rigid requirements. Regarding your assertion that clerical employees are filling the new agents' training classes, FBI records show that since July 13, 1959, of the 349 new agents who entered new agents' training classes, only 61 were former clerical employees, and these were all required to meet the Bureau's standards. Regarding your claim that many new Special Agents quit after a few days in a field office, Bureau records reflect that of the Special Agents who have entered on duty since July 1, 1958, only 2.7% resigned voluntarily during their first six months of service. It is recognized that you did not have these statistics available at the time you made these statements in your letter of April 30, 1961, but the fact that you did make such statements when you could not have been in possession of the facts is a further indication of your lack of the dependability and responsibility a Special Agent of this Bureau must possess.

F. In a letter to Congressman Emanuel Celler, May 21, 1961, you said that an index to Mr. Grapps' enthusiasm for his assignment at Oklahoma City was that ". . . . he was not in the office on time once during the month of December, 1960, which speaks for itself." This statement is false and misleading. Mr. Grapp took annual leave on 14 of the 21 workdays during that month beginning at the

start of business. On the other 7 workdays he was on duty on or before the beginning of the workday. The leave which he took was for personal reasons due to a family hardship. He took no extended leave in 1960 except for four days to assist in family responsibilities. He forfeited annual leave at the end of the year through nonuse.

2. You are not amenable to discipline as evidenced by your protests made in connection with administrative action taken in your case, it being noted:

A. On December 27, 1960, you were censured and placed on probation in connection with a special administrative-type performance rating dated December 15, 1960, and covering the period from October 10, 1960, to December 14, 1960, on which you received an adjective rating of Satisfactory with an unsatisfactory rating on the item of attitude. Your Special Agent in Charge Wesley G. Grapp, commented in connection with the unsatisfactory rating on attitude that you were lacking in enthusiasm for your assignment at Oklahoma City and since your arrival there you had very plainly made it known that you did not like Oklahoma. Although your apparent attitude was the subject of conversation with you on November 28, 1960, December 8, 1960, and again on December 14, 1960, you did not show the required improvement and your Special Agent in Charge stated that he questioned whether you could be utilized on certain interviews because of your apparent outward dislike for the area. On December 27, 1960, in censuring you and placing you on probation it was pointed out that you apparently had placed your personal preferences and conveniences above the welfare and needs of the FBI and your conduct in this matter was definitely not in keeping with the standards expected of Special Agents of the FBI.

B. By letter of January 4, 1961, you protested the special performance rating, as well as the action taken

censuring you and placing you on probation, stating that the wrong conclusions were drawn from the available facts. On January 11, 1961, you stated that you wished to appeal both the unsatisfactory rating on attitude as well as the adjective rating of Satisfactory, both of which, you claimed, entirely disagreed with the facts. On January 27, 1961, you submitted material allegedly supporting your contention that the performance rating was unfair and upon receipt of your communication, Inspector in Charge of the Inspection Section, R. K. Moore, was ordered to proceed to Oklahoma City to look into this situation.

C. Inspector Moore made an inquiry from February 1, 1961, to February 4, 1961, and concluded that the action previously taken in your case was warranted. During the inquiry you made a number of serious allegations involving the Special Agent in Charge. Findgs of Inspector Moore disclosed that your charges were unfounded and on February 13, 1961, you were advised of this determination. You were informed that your judgment in making such unfounded complaints was inexcusable and raised a serious question regarding your competence to serve as a Special Agent. You were advised that you were being suspended without pay for 30 days and continued on probation.

3. Subsequent to your arrival on assignment in the Oklahoma City Division October 10, 1960, you have shown a poor attitude toward the FBI and its Director.

A. Although you agreed in writing as a condition to your entry on duty in the FBI that you would be available for assignment anywhere in the continental or territorial United States, and the performance rating report submitted on you on December 15, 1960, which you reviewed and initialed, indicated that you were completely available for any general or special assignment wherever the needs of the service required, you demonstrated an

unwholesome attitude regarding your assignment at Oklahoma City.

B. An attitude of disrespect for authority was shown by your allegation that an FBI Inspector was sent to Oklahoma City obviously on a mission to discredit you rather than to conduct an impartial investigation. As previously stated above, you could not possibly have known the motive and reasons in sending the Inspector to Oklahoma City on the occasion to which you referred.

C. A lack of loyalty and respect for the organization by which you are employed—indeed, an affirmative hostility—is illustrated by the statement in your letter to Senator Kefauver dated April 30, 1961, that you find yourself in rather distinguished company, referring to Mr. Richard Ogilvie, former Special Assistant to the Attorney General, who had stated to the Chicago press and on television and radio that this Bureau is outmoded and was uncooperative to a special group prosecuting organized crime. You further referred in your letter to the fact that I had informed all FBI agents that Mr. Ogilvie's allegations were unfounded and you expressed the conclusion that it would appear that I hold any statement not serving to perpetuate "the Hoover myth" as therefore an "unfounded allegation." Regarding Mr. Ogilvie's criticisms to which you referred, the FBI extended to the Special Group on Organized Crime complete cooperation that was proper and consistent with our jurisdiction. In this instance you were impertinent, immature, indiscreet and amply demonstrated the undesirability of continuing you as a Special Agent of this Bureau.

D. Your refusal to accept administrative decisions when they do not coincide with your personal preferences, a trait first noted in 1953 when it was necessary to censure you, has now assumed such proportions as to make you a disruptive influence. The 1953 matter arose when you told a Bureau official while at the Seat of Government for

training that you had done no criminal or security investigative work except for two weeks in April, 1951, had never written a report covering a criminal or security investigation, and would like to be assigned to criminal and security work to gain experience. It was determined that you had furnished false and misleading information concerning your previous experience, in that you had written a number of reports covering criminal investigative work performed by you and had done criminal investigative work subsequent to April, 1951. You were censured by letter June 29, 1953, and advised that you would be expected to be more accurate in any future statements and not try to secure assignments on the basis of personal preferences. Your recent and repeated protests to various officials, personally and through your father, for the most part reiterating the same unfounded complaints and including inaccurate allegations, all require and receive careful consideration at Bureau headquarters, where they create an undue administrative burden. For example, such communications were directed by your father to certain officials on February 21, 1961 (two), February 22, 1961, February 23, 1961, and April 6, 1961. All of these communications were referred to this Bureau. In addition, your father on May 29, 1961, directed communications to this Bureau and to the Attorney General which also required attention; on May 24, 1961, you wrote the Attorney General, and under dates of April 3, 1961, April 30, 1961, and May 21, 1961, you sent letters to other public officials protesting the action taken in your case. These communications also were referred to this Bureau for consideration. Between you and your father, you have gone beyond a reasonable exercise of the right to petition outside officials.

Your attitude as evinced in the above-cited instances is so unwholesome from a morale standpoint that to continue you in our service would be most adverse to its best interests. The Bureau no longer considers you a loyal em-

ployee to whom it can confidently entrust the work of a Special Agent, and you have, therefore, lost your usefulness to the FBI.

4. In letters to Senator Jacob K. Javits dated April 3, 1961, to Senator Estes Kefauver dated April 30, 1961, and to Congressman Emanuel Celler dated May 21, 1961, you made unauthorized disclosures of information regarding a highly confidential and highly secret investigation involving the internal security of the United States in which Special Agent Nelson H. Gibbons of this Bureau participated. The case to which you referred in your letters was at the time of your letters, and still is, a highly sensitive investigative operation and you had no authorization to make such disclosures to anyone.

These unauthorized disclosures clearly indicate that you are unable or unwilling to protect the security of confidential information which comes into your possession and in view of this, you constitute a serious security risk as long as you are an FBI employee and as such have access to confidential and restricted information. Consequently, you are not qualified to continue in the service and your continued FBI employment would seriously endanger, because of your lack of good judgment, discretion and reliability, the proper and efficient functioning of the FBI and the welfare of the Nation.

This advance written notice is being given you in accordance with the provisions of Section 14 of the Veterans' Preference Act of 1944. You may submit an answer personally, and in writing, and furnish affidavits in support of your answer. If you wish to answer personally as well as in writing, you may make such personal answer either to your Special Agent in Charge or if you prefer, to Assistant to the Director John P. Mohr at Washington, D. C. You will have ten calendar days following your receipt of this communication in which to submit your answer. Upon receipt of the answer and review of it at

the Bureau, or in the absence of any answer from you, you will be advised of the final decision regarding your proposed dismissal.

On the basis of the same charges set out above, it has been decided to also suspend you without pay, since your retention in active duty status during the period of notice of proposed dismissal is considered contrary to the best interests of the Government, and there is no other suitable assignment available where this condition would not exist. The suspension will begin at the beginning of business on the second workday following the date of your receipt of this letter. This suspension will continue for thirty calendar days or until the effective date of the action which is finally taken in this case, whichever occurs first.

Very truly yours,

(signed) J. Edgar Hoover
John Edgar Hoover
Director

Answer

First Defense

Plaintiff has failed to state a claim upon which relief can be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint defendants aver as follows:

1. They are not required to answer the conclusions of law of paragraph 1.

2, 3, 4, 5, 6, 7, 8, 9, 10. They admit the allegations of fact set forth in paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the complaint.

11. They admit that the Board of Appeals and Review rejected plaintiff's contentions herein, and they respectfully

refer the Court to the entire contents of the letter of said Board dated August 17, 1962, a certified copy of which will be filed herein by them.

12, 13, 14, 15, 16, 17, 18. They deny the allegations of paragraphs 12, 13, 14, 15, 16, 17 and 18 except that they admit that plaintiff was separated from his position, and his separation was upheld by the Civil Service Commission, for reasons set forth in the letter of the Director of the Federal Bureau of Investigation to plaintiff dated June 15, 1961, and they admit that plaintiff has not been restored to his position.

19. They admit that plaintiff has made timely appeal of the administrative decisions rendered with respect to his separation from government service.

Defendants deny all allegations not otherwise specifically answered above.

THIRD DEFENSE

Plaintiff's removal from government service was in accord with all pertinent laws and regulations.

/s/ DAVID C. ACHESON
David C. Acheson
United States Attorney

/s/ CHARLES T. DUNCAN
Charles T. Duncan, Principal
Assistant United States
Attorney

/s/ JOSEPH M. HANNON
Joseph M. Hannon
Assistant United States
Attorney

/s/ ELLEN LEE PARK
Ellen Lee Park
Assistant United States
Attorney

Motion for Summary Judgment

Defendants through their attorney, the United States Attorney for the District of Columbia, respectfully move the Court to grant summary judgment for them on the ground that the pleadings, and the certified copies of administrative records concerning plaintiff which are attached hereto and made a part hereof, disclose that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

/s/ DAVID C. ACHESON
David C. Acheson
United States Attorney

/s/ CHARLES T. DUNCAN
Charles T. Duncan, Principal
Assistant United States
Attorney

/s/ JOSEPH M. HANNON
Joseph M. Hannon
Assistant United States
Attorney

/s/ ELLEN LEE PARK
Ellen Lee Park
Assistant United States
Attorney

Statement of Material Facts Pursuant to Local Rule 9(h)

The material facts involved in this case are set forth in the administrative records which are filed herein in support of defendants' motion for summary judgment and said facts may be summarized for purposes of this motion as follows:

1. J. Edgar Hoover, Director of the Federal Bureau of Investigation, by letter of June 15, 1961 notified plaintiff,

a preference eligible within the meaning of the Veterans Preference Act, of his proposed removal from his position as Special Agent, and gave him in writing four reasons with specifications for said proposed removal.

2. Plaintiff by letter of June 27, 1961 replied to the aforementioned letter from Mr. Hoover, stating that he was refuting the charges.

3. Mr. Hoover by registered letter of July 3, 1961 notified plaintiff that he would be removed from government service at the close of business July 19, 1961; that his answer submitted by letter of June 27, 1961 has been carefully considered, and it was concluded that all four of the charges were sustained and his dismissal was based on all of them. Mr. Hoover advised plaintiff of his right to appeal to the Civil Service Commission.

4. Plaintiff filed an appeal with the Civil Service Commission and a hearing was held on September 26, 27, 28 and 29, 1961 at which plaintiff appeared and was represented by counsel.

5. The Chief, Appeals Examining Office, after reviewing the evidence in detail, found that the Federal Bureau of Investigation complied with the procedural requirements of the law and regulations of the Commission in effecting plaintiff's removal; that the evidence sustained two of the four charges on which plaintiff was removed; that the charges which were sustained supported the conclusion that plaintiff's removal would promote the efficiency of the service; and the Chief, Appeals Examining Office, recommended that no change be made in the personnel action of the Federal Bureau of Investigation in effecting the removal of Mr. Turner on July 19, 1961.

6. Plaintiff appealed to the Board of Appeals and Review of the Civil Service Commission and said Board by letter of August 17, 1962 to plaintiff's counsel affirmed the decision of the Appeals Examining Office. With respect to

plaintiff's contention that statements contained in correspondence sent to members of Congress could not serve as a basis of disciplinary action against him without denying and interfering with his right under 5 U.S.C. 652(d) to petition and to furnish information to members of Congress, the Board of Appeals and Review found:

> "Clearly Mr. Turner, as a person employed in the Civil Service of the United States, had a right to petition Congress as provided in 5 USC 652(d). However, the Board does not believe that the Congress intended, in enacting this statute, to create an absolute or unqualified right. The right given by the statute may be lost, we believe, if (1) the employee's conduct constituted an abuse of the right and went beyond the scope of permissible activity contemplated by the Congress in enacting this legislation, and (2) thereby caused the agency immediate and substantial harm.
>
> "Specifications 1C, 1D, 1E and 1F in the advance notice, taken together, describe statements of the appellant which, if true, would lead to the conclusion that the Federal Bureau of Investigation was staffed with dishonest, irresponsible, and incompetent people, incapable of carrying out the public trust assigned to it. If the statements are untrue, the Congress is apt to be grossly deceived. Certainly, statements of this kind, if false, are likely to impair the efficiency of the agency. Moreover, the irresponsibility of the appellant in making such unjustified statements would render him incapable of performing useful and efficient service for the agency in the future.
>
> "In summary, we are of the opinion that the writing of false and irresponsible statements which either demonstrate the employee's unsuitability for continued employment in the agency or cause substantial harm to his agency, deprives him of the statutory protection of 5 USC 652(d). Consequently, having found specifi-

cations 1C, 1D, 1E, and 1F substantiated, the Board concludes that Mr. Turner's removal was not in violation of that statute.

7. Plaintiff instituted the instant action on October 5, 1962.

/s/ DAVID C. ACHESON
David C. Acheson
United States Attorney

/s/ CHARLES T. DUNCAN
Charles T. Duncan, Principal
Assistant United States
Attorney

/s/ JOSEPH M. HANNON
Joseph M. Hannon
Assistant United States
Attorney

/s/ ELLEN LEE PARK
Ellen Lee Park
Assistant United States
Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3160-62

WILLIAM W. TURNER, *Plaintiff*

v.

ROBERT F. KENNEDY, ET AL., *Defendants*

Cross-Motion for Summary Judgment

Plaintiff, William W. Turner, by his attorneys, respectfully moves the Court to grant summary judgment for him on the ground that the pleadings, the certified copies of administrative records heretofore made a part of the record, and the motion by defendants for a summary judgment discloses that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

WILLIAMS & STEIN
By: /s/ EDWARD BENNETT WILLIAMS
Edward Bennett Williams

/s/ VINCENT J. FULLER
Vincent J. Fuller
1000 Hill Building
Washington 6, D. C.
Attorneys for Plaintiff

Statement of Material Facts Pursuant to Local Rule 9(b)

Plaintiff adopts the statement of material facts heretofore made by the defendants, adding to such statement the following:

1. The Civil Service Commission found evidence to sustain two of the four charges which had been alleged as the bases for the plaintiff's removal from government em-

ployment. This evidence consisted of statements contained in letters admittedly written by the plaintiff to members of the Congress, together with testimony to the effect that said statements were untrue. Independent of these letters, there was no evidence to support the conclusion that the plaintiff did not possess the qualities required of a special agent of the Federal Bureau of Investigation, nor that he could no longer be entrusted to perform work assigned to him.

WILLIAMS & STEIN
By: /s/ EDWARD BENNETT WILLIAMS
Edward Bennett Williams

/s/ VINCENT J. FULLER
Vincent J. Fuller
1000 Hill Building
Washington 6, D. C.
Attorneys for Plaintiff

Order

This cause having come before the Court on defendants' motion for summary judgment and plaintiff's cross-motion for summary judgment, and upon consideration thereof and of argument of counsel, and it appearing to the Court that there is no genuine issue of material fact involved herein and that defendants are entitled to judgment as a matter of law, it is by the Court this 20th day of May, 1963,

ORDERED that plaintiff's motion for summary judgment be and it hereby is denied, and it is further

ORDERED that defendants' motion for summary judgment be and it hereby is granted, and that the action be and it hereby is dismissed.

s/ BURNITA SHELTON MATTHEWS, J.
Judge

Notice of Appeal

Notice is hereby given this 12th day of June, 1963, that William W. Turner, plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20th day of May, 1963 in favor of the defendants against said plaintiff.

VINCENT J. FULLER
Attorney for Plaintiff
1000 Hill Building
Washington 6, D. C.

BRIEF FOR APPELLEES

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,012

WILLIAM W. TURNER, APPELLANT

v.

ROBERT F. KENNEDY, ET AL., APPELLEES

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOHN W. DOUGLAS,
Assistant Attorney General,

DAVID C. ACHESON,
United States Attorney,

ALAN S. ROSENTHAL,
STEPHEN B. SWARTZ,
Attorneys,
Department of Justice,
Washington, D. C. 20530

STATEMENT OF QUESTION PRESENTED

The question presented is whether the dismissal of appellant from service as a Special Agent of the Federal Bureau of Investigation on the basis of knowingly false and irresponsible statements contained in letters to members of Congress violates either 5 U.S.C. 652(d) or the First Amendment to the United States Constitution.

I N D E X

CITATIONS

Cases:

*Cases or authorities chiefly relied upon are marked by asterisks.

Cases--Continued: Page

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IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,012

WILLIAM W. TURNER, APPELLANT

v.

ROBERT F. KENNEDY, ET AL., APPELLEES

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This is an action by appellant, a veterans' preference eligible, challenging his dismissal from service as a Special Agent of the Federal Bureau of Investigation. This appeal is taken from the order of the district court granting appellees' motion for summary judgment. Although the question presented is purely one of law, it should be considered within the detailed framework of the facts of this case. Those facts, not disputed in this Court, may be summarized as follows:

Appellant's conduct leading to his dismissal. For several years prior to 1961 appellant served as a Special Agent of the Federal Bureau of Investigation. In the early part of 1961, obviously dissatisfied with certain aspects of his employment, appellant wrote protesting letters to members of Congress. Among these were letters to the late Senator Estes Kefauver (A.R. 8-12) [1/] and to Congressman Emanuel Celler (A.R. 13-17), both of which are part of the record here.

As is apparent from a simple reading of these letters, appellant's complaints concern his transfer to the Bureau's Oklahoma City office and the ensuing events. He stated that he was dissatisfied with his duties in Oklahoma City and requested a transfer (A.R. 8, 14); that Oklahoma City is regarded as a "disciplinary office" of the Bureau, and that Special Agent in Charge Grapp "prided himself on being a 'hatchet man'" (A.R. 8); that, because of appellant's transfer request, Mr. Grapp prepared a special performance rating on appellant that was non-factual, slanted, incomplete and "obviously intended to discredit" him (A.R. 9, 14); and that, as a result of this special performance rating, he was put on

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1/ "A.R." refers to the separately-bound appendix containing portions of the administrative record. "J.A." refers to the Joint Appendix, bound with appellant's brief.

probation (A.R. 9, 15).

Appellant further stated that he corresponded with Bureau Director J. Edgar Hoover concerning his probation, whereupon Mr. Hoover dispatched Chief Inspector Roy K. Moore to Oklahoma City (A.R. 9); that Inspector Moore's mission "was obviously to discredit me, rather than conduct an impartial investigation" (A.R. 9); that Inspector Moore's investigation was "very cursory" (A.R. 9); that during this investigation, Mr. Grapp "apparently used questionable means in suppressing evidence supporting me" (A.R. 9); and that, as a result of this investigation, he was suspended for 30 days without pay and given a disciplinary transfer to Knoxville for having made "unfounded allegations" (A.R. 9, 15-16). At this point in his letter to Senator Kefauver, appellant stated (A.R. 10): "It would appear that any statement not serving to perpetuate the Hoover myth is therefore an 'unfounded allegation.'"

Appellant also related that Mr. Grapp had prepared an evaluation for appellant's personnel file, and that "[t]he criticism contained therein is completely ridiculous, and the allegations against me unfounded" (A.R. 9, 15). To Senator Kefauver appellant stated (A.R. 10): "The interesting part of the whole thing is that Mr. Grapp's memorandum is now missing from file. Fortunately, I had prepared a copy for myself, which I now have." And appellant reported to

Congressman Celler (A.R. 16): "I have now ascertained that the memorandum from Mr. Grapp has been removed from my personnel file."

In addition to these specific complaints, appellant also made some general observations about the Bureau. He reported that there were "many Agents who have been unjustly maligned under this dictatorial system," specifically relating the experience of a fellow Agent (A.R. 10-11, 13-14). He further stated that most Agents "live and work in fear of this autocratic policy" (A.R. 16); that, as a result, "morale at the Bureau is at an all-time low" (A.R. 11); that many new Agents quit within the first few days in a field office (A.R. 12); and that, consequently, the Bureau has difficulty in recruiting competent men, necessitating the lowering of qualifications to allow clerks to fill the training classes (A.R. 12). Finally, appellant observed that the Bureau was not cooperative with other law enforcement agencies (A.R. 10), and that "[m]ost Agents would prefer to lock horns with organized crime, but are saddled with wresting minor violators from local authorities for the purpose of statistic-gathering" (A.R. 16).

Appellant's dismissal by the FBI. The letters to Senator Kefauver and Congressman Celler were written on April 30, 1961, and May 21, 1961, respectively. On June 15, 1961, appellant received a letter of charges from Director Hoover

(A.R. 1-7). This letter informed appellant that the Bureau was contemplating his dismissal, and assigned four basic reasons therefor: (1) "You have repeatedly demonstrated by untrue or unjustified statements you have made that you do not possess the truthfulness, accuracy, and responsibility required of a Special Agent of the FBI, who must factually report the results of official investigations and cannot make assertions which he knows to be untrue or report as factual information which he does not definitely know to be true" (A.R. 1). (2) "You are not amenable to discipline as evidenced by your protests made in connection with administrative action taken in your case" (A.R. 3). (3) "Subsequent to your arrival on assignment in the Oklahoma City Division October 10, 1960, you have shown a poor attitude toward the FBI and its Director" (A.R. 4). (4) "In letters to Senator Jacob K. Javits dated April 3, 1961, to Senator Estes Kefauver dated April 30, 1961, and to Congressman Emanuel Celler dated May 21, 1961, you made unauthorized disclosures of information regarding a highly confidential and highly secret investigation involving the internal security of the United States" (A.R. 6).

After each of the four basic charges Mr. Hoover listed the specifications upon which it was based. Since Charges 2 and 4 were ultimately rejected by the Civil Service Commission as bases for dismissal, no purpose would be served to discuss

them in detail here.[2/] As to Charges 1 and 3, which the Commission found supported by sufficient evidence and held appropriate bases for discharge, the following specifications were contained in Director Hoover's letter:

First, with respect to Charge 1, accusing appellant of demonstrating by untrue or unjustified statements that he lacked the truthfulness, accuracy and responsibility generally required of FBI Agents, Mr. Hoover listed six untrue statements contained in the letters to Senator Kefauver and Congressman Celler which, he said, were "either deliberately made * * * knowing them to be false, or * * * made * * * without first having ascertained whether or not they were true" (A.R. 1-3):

> (A) Appellant's statement that retaliation was taken against him because of his request for transfer. Director Hoover branded this statement "false," noting that appellant had been informed of the reasons for all disciplinary action taken against him.
>
> (B) The statement that appellant was assigned to a permanent road trip in areas remote from Oklahoma City, thus negating his usefulness for technical work. Mr. Hoover replied that the areas referred to were not remote, and that appellant's predecessor was able to do both road work and technical work.
>
> (C) Appellant's statement that Inspector Moore came to Oklahoma City to discredit him rather than to conduct an impartial investigation. The Director responded: "You could not possibly have known the motive and reasons for

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2/ See footnote 3, and related text, infra.

instructing Inspector Moore to proceed to Oklahoma City to make the inquiry to which you referred. He had no mission to discredit you and your statement that he did was irresponsible and completely unjustified."

(D) The statement that Special Agent in Charge Grapp's memorandum concerning appellant's work performance was missing from the file. Director Hoover labeled this statement "untrue, as the memorandum in question is in the Bureau's files and has never been missing."

(E) Appellant's statements that FBI morale was at an all-time low, that many new Agents quit after a few days, that qualifications for new Agents had been lowered, and that clerks were filling the training classes. After refuting these assertions with facts and statistics, Mr. Hoover stated: "It is recognized that you did not have these statistics available at the time you made these statements in your letter of April 30, 1961, but the fact that you did make such statements when you could not have been in possession of the facts is a further indication of your lack of the dependability and responsibility a Special Agent of this Bureau must possess."

(F) The statement that Mr. Grapp's enthusiasm for Oklahoma City could be measured by the fact that he was not on time once during the month of December 1960. Director Hoover branded this statement "false and misleading," pointing out that Mr. Grapp had been on leave 14 of the 21 work day that month, and that on the other 7 he was on duty at or before the starting hour.

Secondly, as to Charge 3, referring to appellant's poor attitude toward the Bureau and its Director, Mr. Hoover gave four examples (A.R. 4-6):

(A) That despite appellant's agreement in writing at the time of entry on duty that he would be available for service anywhere in the United States,

"you demonstrated an unwholesome attitude regarding your assignment at Oklahoma City."

(B) That appellant reflected "[a]n attitude of disrespect for authority" in labeling Inspector Moore's visit an attempt to discredit him.

(C) That appellant's statements about the FBI's uncooperativeness with other agencies and about the "Hoover myth" demonstrated "lack of loyalty and respect for the organization by which you are employed -- indeed, an affirmative hostility," and that, in these matters, "you were impertinent, immature, indiscreet and amply demonstrated the undesirability of continuing you as a Special Agent of this Bureau."

(D) That appellant's long history of "refusal to accept administrative decisions," evidenced by an earlier censure for inaccuracy and by excessive protests to the Bureau and other Government officials creating an undue administrative burden "has now assumed such proportions as to make you a disruptive influence."

Director Hoover's letter of charges concluded with the statement that "advance written notice is being given you in accordance with the provisions of Section 14 of the Veterans' Preference Act of 1944," and indicated that appellant had a right to a written reply (A.R. 6).

Appellant did exercise his right of reply. On June 27, 1961, he wrote Mr. Hoover concerning the letter of charges (A.R. 18-22), stating at the outset (A.R. 18):

> I am frankly appalled that a person of your stature should affix his signature to a letter containing frivolous and

> distorted charges. It is unfortunate that you have attempted to discredit the honesty and integrity of a loyal American by such tactics.

Appellant then proceeded with a detailed response to the charges, noting preliminarily that they were based largely on his letters to members of Congress. Of the latter fact, appellant observed: "Frankly, my personal correspondence with these public officials is none of the Bureau's business, and I am sure that they will resent being used in this manner" (A.R. 18). As a cursory reading reveals, appellant's attempted refutation of the charges was, in large part, merely repetitious of his letters to Senator Kefauver and Congressman Celler, and again abusive of the Bureau and Director Hoover.

Director Hoover responded on July 3, 1961, that appellant's answer had been carefully considered, but that all charges were sustained, and that appellant's dismissal was to be effective July 19, 1961. Appellant was informed that, under the Veterans' Preference Act, he had a right of appeal to the Civil Service Commission (A.R. 23).

Administrative proceedings. Appellant invoked his right to review by the Civil Service Commission by the filing of an appeal on July 11, 1961 (A.R. 25). A hearing was held by the Commission's Appeals Examining Office on September 26 through 29, 1961, at which appellant was represented by counsel (A.R. 25). And on December 20, 1961, that Office issued its Findings

and Recommendation approving of the FBI's action in appellant's case (A.R. 25-41).

In its findings and recommendation, the Appeals Examining Office first set out in full the charges lodged by the Bureau (A.R. 25-31). It next reviewed the procedural aspects of appellant's removal and concluded that the FBI had "complied with the procedural requirements of the law and regulations" (A.R. 31). Then, dealing with each of the charges individually, the Office concluded that Charges 1 and 3 were supported by sufficient evidence and were permissible grounds for dismissal, but that Charges 2 and 4 were not similarly sustainable. 3/

As to Charge 1, dealing with appellant's untrue and unjustified statements, the Appeals Examining Office began with the proposition that the record must show that these statements were made by appellant "without reasonable basis of belief" in order to sustain the charge that "they are false, untrue or irresponsible" (A.R. 32). Then, taking each of the six specifications (A through F), the Office found that the

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3/ As to Charge 4, relating to unauthorized disclosure of internal security matters, the Appeals Examining Office noted that removal based on grounds related to the national security must be instituted under special statutory procedures, and not under the general Civil Service Rules and Regulations, and concluded therefore that the fourth charge could not serve as a basis for the present dismissal (A.R. 31). With respect to Charge 2, that appellant was not amenable to discipline, the Office concluded that appellant had not acted unreasonably in protesting unfavorable performance ratings he had received (A.R. 38).

first two did not contain statements falling in this category, but that the remaining four (C through F) did indeed present false, untrue or irresponsible assertions (A.R. 32-38).[4/]

With respect to Charge 3, concerning appellant's poor attitude toward the FBI and Director Hoover, the Appeals Examining Office found the charge sustained by the third of the four specifications contained in the letter of charges, i.e., appellant's lack of loyalty and respect for, and his affirmative hostility toward, the Bureau, as evidenced by his statements concerning the FBI's uncooperativeness with other investigatory agencies and his accusations regarding the "Hoover myth"

4/ As to specification A, it was concluded that appellant's assertion of retaliation against him was not on its face a false one (A.R. 32-33). The statement described in specification B, dealing with assignment to areas purportedly remote from Oklahoma City, was found not false, untrue or irresponsible, but merely "a statement of his [appellant's] own conviction and belief" (A.R. 33-34).

However, the remaining specifications, C through F, were found fully sustained by the evidence. The Appeals Examining Office found that appellant had made false, untrue or irresponsible statements in asserting that Inspector Moore's mission was to discredit him rather than to conduct an impartial investigation (specification C, A.R. 34-36); that Mr. Grapp's memorandum concerning his performance was missing from the file, and implying that it "was lost for a purpose" (specification D, A.R. 36); that Bureau morale was low, that qualifications for new Agents had been lowered, and that clerks were filling training classes (specification E, A.R. 36-37); and that it was unusual for Mr. Grapp to be in the office on time, and implying that Grapp had "something to hide" (specification F, A.R. 37-38).

(A.R. 38-39). The remaining specifications underlying this charge (specifications A, B and D) were not sustained (A.R. 39-40).

In sum, then, of the four charges lodged against appellant, the Appeals Examining Office sustained the first and third, the former on the basis of specifications C, D, E and F, and the latter on the basis of specification C (see A.R. 40). As to appellant's assertion that he was immune from any action based on a petition to Congress for redress of grievances, the Appeals Examining Office held simply that "the right to file a grievance does not carry with it the right to make false statements" (A.R. 40). It then concluded (A.R. 40-41):

> Mr. Turner's statements (those which we have found to lack a reasonable basis) support the conclusion that his removal on this basis will promote the efficiency of the service because in making the statements concerning individuals and the organization he put himself in a position where he could no longer effectively serve as a member of the organization.
>
> * * * *
>
> In light of all the evidence and the foregoing analysis, we find that the personnel action of the Federal Bureau of Investigation in effecting the removal of Mr. Turner was warranted and was for such cause as will promote the efficiency of the service as prescribed by Section 14 of the Veterans' Preference Act of 1944, as amended, and that such action was not arbitrary, unreasonable, or capricious.

The Appeals Examining Office consequently recommended "that no change be made in the personnel action of the Federal Bureau of Investigation in effecting the removal of Mr. Turner on July 19, 1961" (A.R. 41).

Appellant then exercised the right of appeal to the Commission's Board of Appeals and Review conferred by the Civil Service regulations. And in a letter decision of August 20, 1962, the Board confirmed appellant's dismissal (A.R. 42-44). In its decision, the Board noted that the appeal raised two questions: (1) Whether statements by an FBI employee to members of Congress can serve as a basis for disciplinary action. (2) Whether there was sufficient evidence to support the charges.

Dealing first with the latter question, the Board held that appellant had been unable to demonstrate an insufficiency of evidence to support the charges (A.R. 43): "On review of all the record, the Board agrees with the analysis of the evidence contained in the decision of the Appeals Examining Office and with its finding that Charges 1 and 3 in the notice of proposed action are sustained by the evidence."

With respect to the remaining question, dealing with appellant's right to petition members of Congress, the Board recognized such a right, but held it not unqualified (A.R. 43-44):

> Clearly Mr. Turner, as a person employed in the Civil Service of the

United States, had a right to petition Congress as provided in 5 USC 652(d). However, the Board does not believe that the Congress intended, in enacting this statute, to create an absolute or unqualified right. The right given by the statute may be lost, we believe, if (1) the employee's conduct constituted an abuse of the right and went beyond the scope of permissible activity contemplated by the Congress in enacting this legislation, and (2) thereby caused the agency immediate and substantial harm.

Specification 1C, 1D, 1E, and 1F, in the advance notice, taken together, describe statements of the appellant which, if true, would lead to the conclusion that the Federal Bureau of Investigation was staffed with dishonest, irresponsible, and incompetent people, incapable of carrying out the public trust assigned to it. If the statements are untrue, the Congress is apt to be grossly deceived. Certainly, statements of this kind, if false, are likely to impair the efficiency of the agency. Moreover, the irresponsibility of the appellant in making such unjustified statements would render him incapable of performing useful and efficient service for the agency in the future.

In summary, we are of the opinion that the writing of false and irresponsible statements which either demonstrate the employee's unsuitability for continued employment in the agency or cause substantial harm to his agency, deprives him of the statutory protection of 5 USC 652(d). Consequently, having found specifications 1C, 1D, 1E, and 1F substantiated, the Board concludes that Mr. Turner's removal was not in violation of that statute.

On the basis of the foregoing, the Board affirmed the decision of the Appeals Examining Office (A.R. 44).

Proceedings in the District Court. On October 5, 1962,

appellant commenced the present action by filing a complaint in the district court seeking restoration of his position with the FBI (J.A. 2-19). After answer (J.A. 19-20), the defendants (appellees here) moved for summary judgment (J.A. 21-24), and appellant responded with a cross-motion for summary judgment (J.A. 25-26). On May 20, 1963, the district court (per Matthews, J.) entered an order denying appellant's motion for summary judgment and granting appellees' identical motion (J.A. 26). Appellant noted appeal from this order on June 14, 1963 (J.A. 27).

SUMMARY OF ARGUMENT

A. 5 U.S.C. 652(d) provides that the right of civil service employees to petition Congress for redress of grievances "shall not be denied or interfered with." The legislative history of this statute shows that it was enacted specifically to override executive orders which first denied federal employees the individual right to petition Congress, and subsequently interfered with that right by requiring knowledge and consent of superiors. The legislative history further reveals that Congress expressly contemplated that this right might be abused by irresponsible exercise, but concluded that employees who so acted would, in any event, be required to suffer the consequences of having made false and misleading accusations. In such circumstances, appellant cannot seriously maintain that

his dismissal, based on unsuitability demonstrated by knowingly false and irresponsible charges, in any way violates Section 652(d).

B. There is no more merit in appellant's suggestion that 5 U.S.C. 652(d) violates his First Amendment right to petition Congress free from abridgment. Assuming, for purposes of this case, that appellant does possess the constitutional right both to petition Congress and to maintain his position in federal employment, that right is not abridged by Section 652(d), which fully protects appellant by prohibiting both suppression or censorship of grievance petitions and retaliatory disciplinary action by the executive branch. To claim further, as appellant does, that the first amendment also protects knowingly false and irresponsible statements, is both to misconceive the nature of first amendment rights and to ignore the pertinent opinions of the Supreme Court which refuse to accord constitutional protection to socially undesirable expression (i.e., fraudulent misrepresentation, libel, obscenity and the like).

ARGUMENT

THE DISMISSAL OF APPELLANT FROM SERVICE AS A SPECIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION ON THE BASIS OF KNOWINGLY FALSE AND IRRESPONSIBLE STATEMENTS CONTAINED IN LETTERS TO MEMBERS OF CONGRESS VIOLATES NEITHER 5 U.S.C. 652(d) NOR THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

It is well established by a long line of decisions that

the function of reviewing courts in cases involving removal and discipline of federal employees is a very limited one. See Eberlein v. United States, 257 U.S. 82, 84; Powell v. Brennan, 91 U.S. App. D.C. 16, 17, 196 F. 2d 871, 873. As this Court has stated, "judicial review of such actions is ordinarily available only to determine if there has been substantial compliance with the pertinent statutory procedures provided by Congress and no misconstruction of governing legislation." Hargett v. Summerfield, 100 U.S. App. D.C. 85, 88, 243 F. 2d 29, 32, certiorari denied, 353 U.S. 970 (and cases cited therein). Consistent with the principle that appointment and removal of executive employees are matters of discretion to be left to the executive branch (see Keim v. United States, 177 U.S. 290), the courts will in no event review the merits of a dismissal. Kilis v. Mueller, 108 U.S. App. D.C. 174, 280 F. 2d 722, certiorari denied, 364 U.S. 883; Green v. Baughman, 100 U.S. App. D.C. 187, 190, 243 F. 2d 610, 613, certiorari denied, 355 U.S. 819.

In apparent recognition of these well established principles of judicial review, appellant has limited his appeal to a very narrow issue clearly within the province of this Court. He does not argue that the charges brought against him were unsupported by evidence, nor does he argue that removal based on those charges was not "for such cause

as will promote the efficiency of the service" (5 U.S.C. 863).[5/] His appeal, rather, is premised solely on the proposition that, by constitutional and statutory provision, statements made to members of Congress cannot serve as a basis for discharge from federal service.

Specifically, appellant argues that 5 U.S.C. 652(d), providing that "[t]he right of persons employed in the civil service of the United States * * * to petition Congress, or any Member thereof, shall not be denied or interfered with," insulates completely the contents of his letters to Senator Kefauver and Congressman Celler, and that, as a consequence, his dismissal from federal service cannot be founded upon statements made therein. He argues further that if this statute be construed as not insulating his letters in this manner, it is violative of the injunction in the first amendment to the Constitution that "Congress shall make no law * * * abridging * * * the right of the people * * * to petition the Government for a redress of grievances."

We show below that Section 652(d)--while barring denial

5/ We must point out, however, that it is not the limitations on judicial review, alone, which would have barred success on such arguments had they been made by appellant. As the Civil Service Commission found, the record contains ample evidence of knowingly false and irresponsible statements made by appellant. Nor could it have been successfully argued that dismissal on the basis of such statements, which, in Director Hoover's words, demonstrate that appellant lacks "the truthfulness, accuracy, and responsibility required of a Special Agent of the FBI" (A.R. 1), was not "for such cause as will promote the efficiency of the service."

Appellant likewise does not contend that the required

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of the right to petition Congress, and prohibiting interference with that right--does not, as appellant contends, confer an "absolute privilege" (Br., p. 9) on the contents of a petition, and thus in no way bars consideration of the substance of such grievances, and the manner of their communication, in determining suitability for continued federal employment. We show further that, so construed, the statute is in no manner inconsistent with the First Amendment.

A. 5 U.S.C. 652(d), Proscribing Denial of and Interference With the Right of Civil Service Employees to Petition Congress for Redress of Grievances, Does Not Prohibit Consideration of the Contents of Such Petitions on the Question of Continued Suitability for Employment.

Appellant argues, in essence, that, in effecting his dismissal because of unsuitability for continued employment as a Special Agent of the FBI, as demonstrated by knowingly false and irresponsible statements made in letters to members of Congress, appellees have denied and interfered with his right to petition Congress for redress of grievances, guaranteed by 5 U.S.C. 652(d). But appellant has been unable to demonstrate that his right to petition has been infringed upon in a manner proscribed by this statute.

5/ (Continued):
procedures for his dismissal were not followed. The notice of charges and proposed dismissal (A.R. 1-7), the opportunity to reply (A.R. 6, 18-22), the hearing and decision by the Appeals Examining Office (A.R. 24-41), and the administrative appeal (A.R. 42-45), were all in full conformity with Section 14 of the Veterans' Preference Act, 5 U.S.C. 863, and the applicable Civil Service Regulations. See 5 C.F.R., Part 22.

1. At no time has the FBI sought to prohibit the petitioning of Congress by appellant, nor has the Bureau required that his petitions be submitted for approval by superiors. Thus, the right to petition, and the act of petitioning, have been left completely unrestrained and unaffected. The FBI, with approval of the Civil Service Commission, has merely reserved to itself the right to consider, as relevant to the question of suitability for employment, any false or irresponsible statements made by its employees. While it cannot be doubted that this reservation has the effect of discouraging the making of knowingly false or irresponsible statements to members of Congress (or to anyone else, for that matter), it cannot seriously be urged that this is an undesirable effect or, further, that this constitutes denial of or interference with the right to petition. The history of Section 652(d) adequately refutes any such argument.

5 U.S.C. 652(d) was originally enacted as Section 6 of the Post Office appropriation bill for 1913 (Act of August 24, 1912, c. 389, §6, 37 Stat. 539, 555). As the legislative history of this provision amply demonstrates, its specific purpose was to negate the so-called "gag rule" imposed upon federal employees by executive orders of Presidents Theodore Roosevelt and William Howard Taft.[6/] The original orders, issued by President Roosevelt, expressly provided that federal employees were to petition Congress, for any reason whatsoever, only through

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6/ See, for example, the House and Senate debates at 48 Cong. Rec. 4493, 4513, 4653-54, 4656, 4738-39, 10670-75.

their department heads. 7/ President Taft's order modified this injunction to some extent, allowing federal employees to petition Congress, but only "with the consent and knowledge of the head of the department." 8/ In effect, these orders at

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7/ Executive Order No. 402 (January 25, 1906), amended Executive Order No. 163 (January 31, 1902), provided in full:

> The Executive order of January 31, 1902, is hereby amended by adding "or independent Government establishments", after the words "Departments" in the the [sic] third and ninth lines.
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> As amended the order will read as follows:
>
> All officers and employees of the United States of every description, serving in or under any of the Executive Departments or independent Government establishments, and whether so serving in or out of Washington, are hereby forbidden, either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation whatever, either before Congress or its Committees, or in any way save through the heads of the Departments or independent Government establishments in or under which they serve, on penalty of dismissal from the Government service.

8/ Executive Order No. 1142 (November 26, 1909), provided in full:

> It is hereby ordered that no bureau, office or division chief, or subordinate in any department of the Government, and no officer of the army or navy or marine corps stationed in Washington, shall apply to either House of Congress, or to any committee of either House of Congress, or to any member of Congress, for legislation, or for appropriations, or for congressional action of any kind, except with the consent and knowledge of the head of the department;

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first denied the individual right to petition Congress and, later, infringed substantially on the right (if not effectively denying it altogether) by requiring superior approval.

It was to override these orders that Congress provided, in Section 652(d), that "[t]he right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof * * *, shall not be denied or interfered with." We submit that, so viewed in its historical context, the statute was not at all intended to withdraw, as evidence of unsuitability, the contents of a petition to Congress, but was intended, rather, to assure merely that the executive branch would not attempt to prohibit or censor such petitions.

Any doubts about the intended effect of Section 652(d) is removed by its legislative history. In reporting out the bill, the Senate Committee on Post Offices and Post Roads expressed concern whether, with respect to grievances of federal employees related to their employment (as distinguished from their possible grievances in their capacity as citizens), "good discipline and the efficiency of the service" did not require presentation "through the proper

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8/ (Continued):

> nor shall any such person respond to any request for information from either House of Congress, or any committee of either House of Congress, or any Member of Congress, except through, or as authorized by, the head of his department.

administrative channels." 9/ The final version of the bill, however, which is now Section 652(d), made no such distinction, but provided the flat proscription against denial of or interference with the right of such employees to petition Congress, regardless of the nature of the grievance.

We suggest that the willingness of Congress to so provide, despite considerations of "good discipline and the efficiency of the service" raised by the Senate committee, is explicable on the basis of the view expressed by Congressman Reilly of Connecticut, a member of the House Committee on the Post Office and Post Roads, which reported out the bill in the House. In commending this aspect of the bill to his colleagues, Congressman Reilly stated on the floor of the House (48 Cong. Rec. 4656):

> I know that some Members of this House will say that this might possibly open a way to indiscreet men to present their personal or imaginary grievances to Members of Congress, but if this is so such employees would have to assume the responsibility for their acts in the event of making false or misleading charges that could not be borne out by evidence on investigation. [Emphasis added.]

We submit that this statement as to the intent of Congress, uncontradicted in all of the legislative history of the statute,

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9/ Senate Report No. 955, 62nd Cong., 2d Sess., at p. 21.

constitutes a dispositive answer to appellant's assertion that his false and irresponsible statements may not serve as a basis for his dismissal because contained in "petitions" to members of Congress.

2. Appellant does not (as, in our view, he cannot) premise his argument either on the historical context of Section 652, or on the relevant legislative material indicating the precise intent of Congress in enacting this provision. His argument proceeds, rather, from an attempt to demonstrate that the effectiveness of this statutory protection depends on the protection of his false and irresponsible statements. He argues (Br., pp. 9-10):

> For § 652(d) to have any meaning, an absolute privilege must attach to communications to members of Congress. Were the rule otherwise government employees would decline under any circumstances to make disclosures to Congress for fear of reprisals from their superiors.

The short answer to this contention is that effective protection against "reprisals" does not require insulation of wrongful statements. It is sufficient protection for appellant and for all other employees that, in addition to any prior suppression or censorship, any disciplinary action taken merely in retaliation for petitioning Congress is prohibited by the statute. To argue further that knowingly false and irresponsible statements in such a petition, which demonstrate to the satisfaction of the executive branch that the employee

is no longer qualified to serve in the particular position held, must also be insulated, is to claim far more than is necessary to assure the right of petition. That this rule discourages employees from making to Congress dishonest and irresponsible charges, should not be regarded as undesirable. As we have shown above, this result was expressly contemplated and intended by Congress.

If the foregoing demonstration of the congressional intent underlying the enactment of 5 U.S.C. 652(d) were at all lacking in refuting appellant's claim to an "absolute protection" (Br., p. 10) for the contents of his petition, that deficiency would be more than made up by a showing that appellant's position, carried to its logical extreme, would lead to results neither necessary nor desirable. Assume, for example, that during the course of the instant litigation, either in the district court or in this Court, appellant became dissatisfied--without justification--with the courts' handling of his case, and that, as a result, he wrote disparaging letters to members of Congress, making utterly false and irresponsible statements concerning the honesty and impartiality of the courts. Under appellant's interpretation of Section 652(d), he would be allowed to resist successfully a contempt of court citation on the ground that his remarks were contained in a grievance petition to Congress, and thus beyond the reach of the courts in a

disciplinary proceeding. The mere statement of this possibility is sufficient to undercut appellant's contention. We see no possible distinction between a claim of "absolute privilege" in that case, and appellant's identical claim here.

3. Appellant's inability to support his position with either relevant evidence of congressional intent or a demonstration of the desirability or necessity of the absolute rule he proposes is not at all remedied by the three cases upon which he relies (Br., pp. 7-9): Levine v. Farley, 70 U.S. App. D.C. 381, 107 F. 2d 186, certiorari denied, 308 U.S. 622; Eustace v. Day, 198 F. Supp. 233 (D. D.C.), aff'd per curiam, ____ U.S. App. D.C. ____ , 314 F. 2d 247; Steck v. Connally, 199 F. Supp. 104 (D. D.C.).

(a) The Levine case arose under subsection (c) of Section 652--rather than subsection (d)--which provides, inter alia, that presentation of grievances to Congress by postal employees shall not constitute cause for reduction or removal.[10/] Levine was discharged for causing false statements to be published in newspapers, and this Court approved the dismissal despite the

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10/ 5 U.S.C. 652(c) provides:

> Membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence,

fact that substantially the same statements were submitted, in the form of a resolution, to Congress. Since the dismissal was not based on the petition to Congress, but on the release to the newspapers, this Court did not reach the question involved here, i.e., whether the prohibition against taking retaliatory disciplinary action because of a petition to Congress in any way insulates from consideration the contents of such a petition. In view of the fact that the "false statements" which Levine caused to be published were contained in a news release summarizing the resolution submitted to Congress, this case, if relevant at all, supports appellees' position that the contents of such a petition are not so insulated.

(b) The Eustace case also arose under Section 652(c), specifically under the clause therein providing that membership in an organization of postal employees shall not constitute cause for reduction or removal. The employee there was dismissed for participating in the public distribution of handbills critical of his superiors, and argued that dismissal on this basis violated the foregoing provision of Section 652(c). The

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10/ (Continued):

> by any person or groups of persons in said postal service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any member thereof shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service.

district court, in upholding the dismissal, held that the statute merely provides that membership, itself, is not a cause for dismissal, and does not mean that the employee's conduct in that capacity cannot be considered on the question of suitability for continued employment. This Court affirmed this determination per curiam. Thus, although relevant only by analogy, the Eustace case supports fully the proposition that the protection against infringement of a statutory right which a civil service employee enjoys is not an absolute license to act in any way he sees fit; the manner in which the right is exercised can always be considered relative to the question of suitability for continued employment.

(c) The Steck case, unlike the preceding two cases, did arise under subsection (d) of Section 652. Although the brief opinion of the district court (per Holtzoff, J.) does not set out fully the facts, the district court file (in Civil Action No. 476-61) reveals that the employee there was discharged, and his dismissal was confirmed, on two grounds: that contrary to a Navy regulation, he had circulated among federal employees a grievance petition to Congress, and that the petition he circulated contained unfounded statements. In the district court he argued that the regulation requiring approval of such petitions was contrary to Section 652(d) (see Complaint, paragraph 13), and the court sustained this attack. In doing so, however, the district court unfortunately

used unnecessarily gratuitous language. It held that Section 652(d)[11] "does not contemplate that the head of a Department may censor the contents of the petition or that he may dismiss the employee concerned therein, if he can prove that the statements contained in the petition are untrue" (199 F. Supp. at 105).

We fully agree with the first portion of this statement, that the statute prohibits censorship of these petitions. Likewise, we do not dispute the court's characterization of the Navy regulation requiring prior approval as censorship. In our view, however, the remainder of this statement, to the effect that mere proof that the statements in the petition are untrue is not sufficient grounds for dismissal, is unnecessarily broad. If the court is saying only that discharge cannot be premised merely upon a showing that the employee's grievances are insignificant or non-existent, we fully agree. We hasten to point out, however, that this was not the situation in the instant case; here the statements were not merely untrue, they were knowingly false and irresponsible, and thus demonstrated to the satisfaction of the FBI that appellant no longer possessed

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11/ Actually, the district court referred to subsection (c) and the provision that petitioning Congress by postal employees shall not be cause for reduction or removal. Since Steck was a Navy employee, subsection (c) was, on its face, inapplicable to him. Nevertheless, we have assumed that subsection (d) implicitly contains the same prohibition against retaliatory demotion and removal.

"the truthfulness, accruacy, and responsibility of a Special Agent of the F.B.I., who must factually report the results of official investigations and cannot make assertions which he knows to be untrue or report as factual information which he does not definitely know to be true" (A.R. 1). To the extent the district court intended to go further, possibly to hold that the contents of such a petition could not be so considered, we respectfully submit, on the basis of the foregoing discussion, that such a conclusion is wrong and should not be adopted by this Court.

In sum, the governing statute, 5 U.S.C. 652(d), protects the right of civil service employees to petition Congress for redress of grievances by prohibiting the executive branch from denying or interfering with that right by means of suppression, censorship or retaliatory action. The legislative history of the statute makes clear, however, that there was no intent to insulate the contents of such petitions from consideration on the question of suitability for employment, particularly where the petition contains knowingly false and irresponsible statements. And, since appellant does not attack in this Court the administrative decision that his false and irresponsible statements demonstrate his unsuitability for continued employment as a Special Agent of the FBI, that

determination must be sustained.

B. Construction of 5 U.S.C. 652(d) to Allow Administrative Action to be Taken on the Basis of the Contents of a Grievance Petition Does Not Render the Statute Violative of the First Amendment.

Appellant argues, alternatively, that if Section 652(d) is to be construed, as we have just shown it must, to allow consideration of the contents of his letters as bearing upon suitability for employment, that provision "constitutes a law enacted by the Congress abridging the right of the people to petition the government for a redress of grievances and is therefore unconstitutional" (Br., p. 10). This argument, that 5 U.S.C. 652(d) is violative of the First Amendment to the United States Constitution, is without merit.

The concise and dispositive answer to this contention is simply that the effect of 5 U.S.C. 652(d) is not to "abridge" rights; in view of its purpose, demonstrated above, to override executive orders restricting the right of petition, its effect is quite clearly to the contrary: If not actually conferring new rights, it certainly does nothing more "harmful" to the status of federal employees than to give congressional confirmation to a pre-existing right to petition Congress free from terms of employment which deny or interfere with that right. In no sense, therefore, can this statute be viewed as having been intended to reduce or narrow the right of petition which

existed prior to its enactment. Consequently, appellant's characterization of Section 652(d) as "a law enacted by the Congress abridging the right of the people to petition the government" cannot stand.

Section 652(d) can therefore be viewed as abridging appellant's First Amendment right to petition Congress only if he can demonstrate that his constitutional right of petition is, in fact, broader than the similar right provided by the statute. To do so, appellant must maintain that, apart from 5 U.S.C. 652(d), the general statutes pursuant to which his is employed, if construed as permitting his dismissal based on the contents of his grievance petition to Congress, violate a right protected by the Constitution. Such an argument, claiming constitutional protection for false and irresponsible conduct demonstrating unsuitability for continued government employment, wholly misconceives the nature of any such First Amendment right.[12/]

Even assuming, as we must even to respond to such a contention, that appellant possesses a constitutional right both to petition

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12/ We have assumed, arguendo, that the general statutes pursuant to which appellant is employed, merely by their silence on this subject, could be viewed as abridging the right to petition. If required to argue this point, however, our position would be that statutory silence can no more constitute such congressional abridgment than the failure of Congress to enact any legislation whatsoever governing federal employment. In neither case could an employee point to a law, made by Congress, which abridges the right of petition.

Congress and, at the same time, to retain his position in federal employment,[13/] it is plain that that right has not been infringed here. Appellant's dismissal was not a retaliatory act; he was not removed for petitioning Congress. Rather, on the basis of knowingly false and irresponsible statements made in his petition, which demonstrated to his immediate superiors and to the Civil Service Commission that he was no longer qualified to serve as a Special Agent of the FBI, it was determined that his removal would promote the efficiency of the service.

Appellant would apparently argue, however, that the constitutional protection of his right of petition goes beyond prohibiting suppression, censorship or retaliatory disciplinary action, none of which are present here. He would have this Court hold that, to be effective, this constitutional guaranty must also insulate the contents of his petition, despite

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13/ The Government's position continues to be that there is no constitutional right to government employment (Keim v. United States, 177 U.S. 290), and that in the absence of legislation such employment can be revoked at will (Cafeteria Workers v. McElroy, 367 U.S. 886, 896), even on the basis of utterances otherwise protected by the constitutional guarantee of free speech (Washington v. Clark, 84 F. Supp. 964, aff'd sub. nom. Washington v. McGrath, 86 U.S. App. D.C. 343, 182 F. 2d 375, aff'd by equally divided court, 341 U.S. 923). On the other hand, the Supreme Court has suggested that dismissal from employment in retaliation for having exercised a constitutional right is not permissible (see Slochower v. Board of Education, 350 U.S. 551, 555). Thus, had appellant's dismissal been effected in retaliation for having petitioned Congress, the question whether this violated a constitutional right would be squarely presented. However, since appellant was not dismissed for petitioning Congress, but rather for unsuitability demonstrated by knowingly false and irresponsible

 (fn. continued on next page)

the fact that his letters contained knowingly false and irresponsible statements. But this extreme and absolute construction of the First Amendment is neither necessary to protection of the assumed constitutional right nor supported by pertinent Supreme Court decisions.

As we have shown in the preceding section of this argument, sufficient protection for the right of petition of government employees guaranteed by 5 U.S.C. 652(d) is contained in the injunction against outright prohibition or censorship of a grievance petition, and against later retaliatory action for having exercised this constitutional perogative. These guarantees are fully effective in protecting, from disciplinary action, all reasonable and objective complaints contained in grievance petitions. And, just as these protections satisfy the statutory prohibition of denial of and interference with the right of petition, they likewise are sufficient to meet the First Amendment proscription of abridgment of the right of petition. To argue further, as appellant does, that these protections are

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13/ (Continued):
statements contained in his letters to members of Congress, we are willing to assume, for purposes of this case, that appellant does have a constitutionally protected right both to petition Congress and, at the same time, to retain his position in federal employment, and are content to demonstrate, as we do above, that the action taken would not be violative of that right.

not sufficient to meet the constitutional guaranty, and that all statements made in a grievance petition must be insulated from consideration for any purpose, is merely to claim constitutional sanction for reprehensible conduct in communicating with Congress -- here the making of knowingly false and irresponsible statements wholly superfluous to the airing of appellant's grievance.

The premise of appellant's argument -- that the right to petition Congress for redress of grievances includes the unrestricted right to make knowingly false and irresponsible statements which bear directly on suitability -- is one which the Supreme Court would surely reject. The Court has never allowed the First Amendment, by means of absolute construction, to serve such undesirable purposes. Indeed, the Court has on numerous occasions held that the guarantees of expression contained in the First Amendment do not require condonation of conduct inconsistent with the rights of the public as a whole. Thus, for example, the Supreme Court has held outside the area of constitutionally-protected speech fraudulent misrepresentation,[14/] as well as libel,[15/] disorderly language

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14/ E.g., Donaldson v. Read Magazine, 333 U.S. 178, 191 (rejecting the contention "that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes").

15/ E.g., Beauharnais v. Illinois, 343 U.S. 250, 366.

in public,[16] and obscenity.[17] We submit that appellant's knowingly false and irresponsible statements, whether communicated to members of Congress or to anyone else, are deserving of no greater constitutional stature.

Thus, little attention need be given appellant's argument that either Section 652(d) or any other pertinent statutes are inconsistent with the First Amendment. Appellant's contention that, despite the prohibition of suppression, censorship and retaliatory disciplinary action, the protection afforded is deficient because it fails to insulate a petitioner from the consequences of having made knowingly false and irresponsible accusations to members of Congress, would be easily dismissed by the Supreme Court. We submit that it is, likewise, deserving of the same dispatch here.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

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NOVEMBER 1963

16/ E.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (holding that "the right of free speech is not absolute at all times and under all circumstances").

17/ E.g., Roth v. United States, 354 U.S. 476.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,012

WILLIAM W. TURNER, *Appellant*,

v.

ROBERT F. KENNEDY, ET AL., *Appellees*.

Appeal from Judgment of the United States District Court for the District of Columbia

PETITION FOR REHEARING IN BANC

Appellant respectfully petitions for a rehearing of the above-captioned appeal by the Court in banc.

The judgment appealed from was entered by the District Court (Matthews, J.) on May 20, 1963, without findings of fact, conclusions of law or opinion. After argument before a division of this Court on January 22, 1964, a majority of

the division affirmed the judgment below on April 2, 1964, *per curiam* and without opinion. In dissenting from the action of the majority of the division, Judge Fahy set forth at some length the grounds upon which he would have reversed the judgment below.

The issue before the Court transcends the case which raises it. The question in the case is whether, in the face of 5 U.S.C. § 652(d), an F.B.I. Agent may lawfully be dismissed for writing letters to a Senator and a Congressman which, as subsequently concluded but not admitted by Appellant, contain untrue, irresponsible and unjustified statements about the agency and its Director. The larger issue relates to the extent, if any, to which a government employee's right to convey information to Congress—and, as a corollary, Congress' right to obtain information from government employees—may be lawfully circumscribed.

As to the narrow issue presented by the case, appellant argued to the division of the Court that the right of communication protected by § 652(d) is absolute. Judge Fahy's view is that the right is limited only by the requirement that its exercise be free from malice. The appellees argued that mere irresponsible untruth vitiates the right. A more extreme position, though not urged by the appellees, may be that untruth alone destroys the right, so that a government employee speaks to Congress at his peril. Appellant does not, in this petition, argue the merits of any of these positions. He urges only that, on a matter of such obvious importance not only to him and to thousands of other government employees, but also to all the people represented by Congress, this Court should not pronounce judgment without pronouncing its reasons for its judgment. While some claims can be disposed of by simple judicial fiat, others deserve a judicial determination and exposition of the existence of the asserted rights and of their limitations, if they are limited. This case, it is submitted, falls within the latter group. Both in the court below and

in this Court appellant has learned only that he has not prevailed in his suit. Neither court has expressly denied the existence of his right to speak to Congress about the F.B.I. Nor has either court expressly placed any limitations on that right.

We are not unaware that this Court rehears cases *in banc* only in exceptional situations. We think this is such a situation. The legal question is one of first impression in this Court[1] as well as first importance. If this Court's decision of the question becomes dispositive, the grounds of the decision ought to be made known so that all will know what the law is. If the question is submitted to the United States Supreme Court, that tribunal should have the advantage of knowing this Court's position. Since the majority of the division saw fit to write no opinion, it is respectfully submitted that the case should be reheard by the full Court.

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[1] The issue arose in the District Court in *Steck* v. *Connally*, 199 F. Supp. 104 (D.D.C. 1961). There Judge Holtzoff's decision supported appellant's view of the statute. He said:

> ". . . This statute does not contemplate that the head of a Department may censor the contents of the petition or that he may dismiss the employee concerned therein, if he can prove that the statements contained in the petition are untrue.
>
> "[2] To be sure an activity of this kind can adversely affect the morale of a Government department. It can be vexatious and annoying at times if the employee acts unreasonably, but the statute contains no limitation. . . ."

The government elected not to appeal from the District Court judgment.

CONCLUSION

For the foregoing reasons appellant respectfully prays that this Court allow rehearing in banc and reverse the judgment of the court below.

Respectfully submitted,

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April 17, 1964

CERTIFICATE OF GOOD FAITH

It is hereby certified that this petition is presented in good faith and not for purposes of delay.

VINCENT J. FULLER